>> ALL RISE!
HEAR YE, HEAR YE, HEAR YE, THE SUPREME COURT OF FLORIDA IS NOW IN SESSION, ALL WHO HAVE CAUSE TO PLEAD, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD.
GOD SAVE THE UNITED STATES AND THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT.
LADIES AND GENTLEMEN, THE SUPREME COURT OF FLORIDA, PLEASE BE SEATED.
>> GOOD MORNING AND WELCOME TO THE SESSION OF THE FLORIDA SUPREME COURT.
THE FIRST CASE ON THE DOCKET TODAY IS NGOC C. THACH VERSUS THE STATE OF FLORIDA.
COUNCIL.
>> CERTAINLY.
>> THE COURT CONSIDER THE EVIDENCE IN THIS TRIAL, A MISTRIAL.
THAT WAS - THE EVIDENCE PRESENTED.
BECAUSE THE ISSUANCE WAS THE PRINTING GIVEN OF THIS COURT, YOUR HONORS, WHAT WAS MENTIONED FOR THAT.
WHAT WAS MADE FOR THE NOTICE.
THE VENUE.
FOR MISTER YOUNG.
FOR THAT.
QR - THAT YOU BE WITH OTHERS.
OUTSTANDING WITH A BRIEF.
>> CAN I ASK YOU A QUESTION.
IS YOUR ARGUMENT BASED ON THE PER SE PREJUDICE WHAT DO YOU HAVE ARGUMENTS THAT EVEN IF WE ACCEPT THE PREMISE THAT WE SHOULD DO A PREJUDICE ANALYSIS THAT YOU COULD PROVIDE THAT.
>> THE COURT OF APPEALS - EVIDENCE REVERSIBLE EVIDENCE - FOR THAT -- BASICALLY YOUR HONOR, IT IS REVERSIBLE IS JUST THAT WITH EVERY TIME FOR THAT TYPE OF ERROR.
ALL GET THE WRONGFUL EVER.
SO IN THIS CASE WHERE THE DEFENDANT WAS CONVICTED ON A CHARGE -- THE DUE PROCESS

PROCESS WAS GOING TO BE
DIFFICULT.
HOW IMPORTANT IS IT FOR IT TO BE
REVERSIBLE AND THE RESULTS.
>> THANK YOU.
>> THE AUDIENCE HAS SEEN IF YOU
ALLOW DCA TO BE -- AFTER THE
EVIDENCE FOR THE STATE IS THAT
THEY DO TO THE AUDIENCE HAD NOT
BINDING, THE PURPOSE OF THE
INFORMATION TO BEGIN WITH.
AND, YOUR HONOR, ANY QUESTIONS I
WILL ANSWER AND MAKE IT
REVERSIBLE.
>> COUNSEL?
>> MAY IT PLEASE THE COURT,
VIRGINIA HARRIS ON BEHALF OF THE
STATE OF FLORIDA.
I UNDERSTOOD PETITIONER'S
ARGUMENT TO GO IN TWO PARTS FROM
HER BRIEF AND SOME OF HER
STATEMENTS TODAY.
I UNDERSTOOD HER ARGUMENT TO BE
FOR THE FIRST PART THAT
PETITIONER WAS PREJUDICED
BECAUSE HE CLAIMED AT TRIAL THAT
HE COULD HAVE POTENTIALLY ASKED
QUESTIONS ABOUT THE NATURE OF
THE TOUCHING AND WE DON'T AGREE,
THE RECORD SHOWS OTHERWISE.
THE DEFENDANT'S DEFENSE, EVEN
THOUGH HE HAD ALREADY BEEN
CHARGED WITH A COUNT OF LEWD OR
LASCIVIOUS MOLESTATION AGAINST
EACH VICTIM HE STILL CAME IN AND
ONLY ARGUED THE VICTIMS HAD
FABRICATED THESE ALLEGATIONS
BECAUSE THEY DIDN'T LIKE THEIR
STEPFATHER OR HE WAS ABUSING
THEIR MOM, HE WAS A
DISCIPLINARIAN AND BECAUSE OF A
SPECIFIC FIGHT THAT HAPPENED
WHERE THE DEFENDANT WAS ARRESTED
SO THAT SHOWS THAT HE WASN'T
GOING TO DO THAT AND IN
ADDITION, THE TYPE OF
ALLEGATIONS WE HAVE HERE ARE NOT
ONES WHERE YOU COULD MAKE A
CREDIBLE ARGUMENT THAT THERE
WASN'T.
OR LASCIVIOUS TOUCHING.
FOR THE MOST PART ALL OF THE
INCIDENTS OCCURRED WITH THE
DEFENDANT GOING INTO THE

CHILDREN'S ROOM AT NIGHT,
GETTING IN THEIR BEDS, PUTTING
HIS PENIS UP AGAINST THEIR THAT,
THEIR HEINOUS, PUTTING HIS HAND
ON THE GYNECOLOGIST
DISCUSSION OF HIS PENIS AND
MOUTH, HAVING SEX WITH ONE OF
THEM, PENETRATION, MANY
INSTANCES, EVEN THOUGH ALL THREE
OF THE CHILDREN WERE JOINTLY
TRIED, THEY WERE SIMILAR VICTIMS
AND THE STATE INTRODUCED OTHER,
SIMILAR INSTANCES THAT WERE NOT
CHARGED FOR SOME OF THE CHILDREN
SO IT IS CLEAR FROM THESE
CIRCUMSTANCES THAT IF HE DID IT,
THERE WAS LEWD OR LASCIVIOUS
INTENT.
THIS ISN'T THE TICKLING INCIDENT
FROM THE LIVING ROOM WHERE HE
SAYS I WAS TICKLING HER AND SHE
TURNED THE WRONG WAY AND I
ACCIDENTALLY TOUCHED SOMETHING
THAT SHOULDN'T HAVE.
>> I WAS CURIOUS HOW FAR ALONG
IN THE TRIAL DO YOU MAKE A
DECISION THE STATE UNDER THE
CIRCUMSTANCES WOULD HAVE BEEN
PERMITTED THE INFORMATION?
>> IT WAS AT THE PART WITH THE
JUDGMENT OF ACQUITTAL.
TO SUBSTANTIVELY AMEND THE CASE
IT IS BECAUSE THERE HAS BEEN A
FACTUAL DEVELOPMENT AT TRIAL AND
THEY'RE WORRIED ABOUT SURVIVAL.
>> THE DEFENDANT COULD HAVE
TESTIFIED AND THE PROSECUTOR
COULD STEP UP AND APPROACH THE
BENCH.
I WOULD LIKE TO AMEND THE
INFORMATION FOR THIS OTHER
ELEMENT.
>> I HAVEN'T SEEN CASE LAW THAT
--
>> HOW FAR DO YOU THINK WE CAN
GO OR YOU CAN GO IN CHANGING THE
ELEMENT OF A CRIME?
>> BASED ON THE LANGUAGE IN THE
CASE LAW, AS LONG AS HE'S NOT
PREJUDICED --
>> WITH NOT GUILTY CAN YOU
CHANGE THE EVIDENCE AT THAT
TIME?
WHY NOT?

>> THAT IS THE POINT.
>> IF THE VERDICT IS GRANTED IT IS OVER.
>> I THINK THE TRIAL WOULD STILL HAVE TO BE ONGOING.
IF IT WAS ACTUALLY SUBMITTED TO THE JURY AND THEY RENDERED A VERDICT.
>> LET'S SAY THE CLOSING ARGUMENT, THE PROSECUTOR STEPS FORWARD, I WOULD LIKE TO CHANGE THE INFORMATION, AND THE JURY INSTRUCTION.
>> I DON'T THINK THE STATE COULD SHOW THERE WASN'T PREJUDICE UNDER THOSE CIRCUMSTANCES BECAUSE YOU'VE CHANGED CHARGES AND HE OR SHE DIDN'T MAKE ANY ARGUMENT ON THAT.
I DON'T SEE HOW THE DEFENDANT COULD BE PREJUDICED THERE.
WE ARE NOT SUGGESTING THE STATE SHOULD BE ABLE TO GO AROUND AMENDING INFORMATION TO CHANGE THE CHARGE AT WILL.
IN MANY CIRCUMSTANCES THE DEFENSE WOULD BE PREJUDICED.
WE ARE JUST SAYING UNDER THESE CIRCUMSTANCES HE WASN'T PREJUDICED AND I DON'T DISAGREE A LOT WITH THE OTHER CASES THAT WERE DECIDED UNMENTIONED BY PETITIONER.
I THINK THIS CASE IS A UNIQUE SET OF CIRCUMSTANCES.
HOW OFTEN DO YOU HAVE A DEFENDANT ALREADY CHARGED WITH THREE COUNTS AGAINST EACH VICTIM OF THE CHARGE THAT IS AMENDED TO THE OR LASCIVIOUS MOLESTATION?
HOW OFTEN DO YOU HAVE A CASE WHERE YOU JUST CAN'T CHALLENGE.
OR LASCIVIOUS TOUCHING, YOU KNOW THAT HE WASN'T GOING TO CHALLENGE THAT AND ALSO IN THIS CASE YOU LEARN FROM HIS CLOSING ARGUMENT THAT IT WOULD HAVE HURT HIS DEFENSE BECAUSE IN HIS CLOSING HE ARGUES THE VICTIMS AREN'T CREDIBLE AND ONE OF THE REASONS HE ARGUES THAT IS THEY WERE NOT DETAILED ENOUGH SO OBVIOUSLY HE WOULDN'T HAVE WANTED TO ASK MORE QUESTIONS TO

GET MORE DETAILS BECAUSE THAT
WOULD HAVE DERAILED HIS DEFENSE
AND I WOULD LIKE TO DECK OUT
WHAT TOOK PLACE WHEN THIS
CONVERSATION AROSE, THAT THERE
WAS A DISCUSSION ABOUT WHETHER
OR NOT THE STATE COULD AMEND
THESE CHARGES, THE JUDGE SAID
I'M GOING TO GIVE THE PARTIES
TWO HOURS TO THINK ABOUT THIS.
IF YOU FINISH SOONER, CONTACT MY
J A.
THEY COME BACK AFTER 30 MINUTES
JUST A LITTLE MORE THAN 30
MINUTES, THE STATE SAYS I TO
AMEND THESE TWO MOLESTATIONS,
THE DEFENSE IS NOT PREJUDICED,
THE JUDGE ASKS FOR A RESPONSE,
THE DEFENSE ATTORNEY SAYS I'M
GOING TO OBJECT ON TIMELINESS
ALONE AND LEAVE IT AT THAT.
HE WASN'T GOING TO ARGUE HE
WASN'T PREJUDICE, THE JUDGE
PRODS A LITTLE MORE AND SAYS CAN
YOU ARTICULATE ANY PREJUDICE AND
HE SAYS I GUESS THE ONLY THING
IS THERE IS THIS LEWD OR
LASCIVIOUS INTENT AND
POTENTIALLY I COULD HAVE ASKED
MORE QUESTIONS ABOUT THIS
TOUCHING SO HE WAS REALLY MAKING
A TOKEN OBJECTION HERE IN THE
STANDARD IS YOU HAVE TO SHOW
DEFENDANT SUBSTANTIAL RIGHTS
WERE PREJUDICED.
WAS HE REALLY SAYING THAT.
I LOOKED UP THE WORD SUBSTANTIAL
AND IT TALKS ABOUT GREAT WORTH,
IMPORTANCE ACTUALLY EXISTING.
IF YOU SAY THE DEFENDANT IS ONLY
POTENTIALLY COULD HAVE ASKED
QUESTIONS, IS THAT ACTUALLY
DISTINCT PREJUDICE BECAUSE HE'S
ONLY SAYING IT IS POTENTIAL.
>> ISN'T THAT A LEGAL TERM?
>> I LOOKED IT UP AND BECAUSE OF
CASE LAW, STATE VERSUS ANDERSON
WAS DONE MORE IN THE 80s, I
LOOKED UP FROM THE SAME BLACK
SLIDE DICTIONARY THAT I LOOKED
UP THE WORD SUBSTANTIVE WHICH
MEANS ESSENTIAL OR INTEGRAL AND
THAT IS WHERE I GOT THE
DEFINITION FROM AND SO I CAN

SUPPLEMENT WITH THAT IF YOU
LIKE.
>> COUNSEL, LEAVING ASIDE
JUDGMENT, WHAT ABOUT
PETITIONER'S ARGUMENT OF NOTICE
CAN CONSTITUTE PREJUDICE?
>> I DON'T REALLY AGREE THAT HE
WAS WHICH I CONSIDER NOTICE AND
WAS TRIAL PARTIES DO AS A
PRACTICAL MATTER.
THE FOUR COUNTS WE ARE TALKING
ABOUT HE WAS CHARGED WITH SEXUAL
BATTERY IN TWO OF THE COUNT AND
SEXUAL ACTIVITY IN THE OTHER TWO
AND THE ACTS WERE PENETRATION OR
UNION WITH A FOR CHINA,
PENETRATION OR UNION WITH THE
FINGER, THAT IS, PENETRATION OR
UNION WITH THE HEINOUS WITH HIS
PENIS AND THE OTHER IS TOUCHING
THE HEINOUS OR PENETRATION IN
THE OTHER IS DIGITAL PENETRATION
OF THE VAGINA SO HE WAS ON
NOTICE OF THE SEXUAL NATURE OF
THE OFFENSES.
THIS COURT HAS EVEN INDICATED
THAT AS A PRACTICAL MATTER, THE
ACTS CONSTITUTING CAPITAL SEXUAL
BATTERY WOULD INCLUDE.
OR LASCIVIOUS MOLESTATION.
UNDER THESE CIRCUMSTANCES YOU
CAN'T HAVE ONE WITHOUT THE
OTHER.
IS LIKE THE FIRST DISTRICT
SEATED TO PROVE THE GREATER
OFFENSE, THE LESSER, NOT THE
LESSER INCLUDED BUT THE
MOLESTATION HAD TO OCCUR FIRST.
FOR EXAMPLE TECHNICALLY IN THE
COUNTS THAT ALLEGED DIGITAL
PENETRATION OR UNION, UNION BY
THE FINGER IS NOT A CAPITAL
SEXUAL BATTERY SO THAT
ALLEGATION COULDN'T HAVE BEEN
EVEN AS IT STOOD IN THERE.
THERE HAD TO BE PENETRATION BY
THE FINGER SO YOU WOULD KNOW IF
THE TESTIMONY CAME OUT BUT THAT
WOULD HAVE TO BE CHANGED.
IN ORDER BASED ON THE
CIRCUMSTANCES WITH THESE YOUNG
CHILDREN SLEEPING IN THE BED ON
THEIR SIDE WHEN HE COMES IN TO
DO THESE THINGS, YOU CANNOT

PENETRATE THE VAGINA WITHOUT
TOUCHING IT FIRST YOU CAN'T
TOUCH THE HEINOUS WITH YOUR
PENIS OR PENETRATE IT WITHOUT
TOUCHING THE BUTTOCKS.
THESE THINGS HAD TO HAPPEN FOR
THE GREATER OFFENSES TO OCCUR
AND THAT WILL IS ONE OF THE
REASONS THE FIRST DISTRICT
DISTINGUISHED THIS CASE THE
OTHER CASES WHERE THE CRIMES
WERE JUST CHANGE, SOMETHING LIKE
FINGERS BEING CHANGED TO ORAL
SEX WHERE THEY ARE COMPLETELY
CHANGING THE CHARGE.
IN THIS CASE IT SHOWED A LESSER
DEGREE OF TOUCHING.
IN THIS CASE WE DO BELIEVE THAT
HE WAS AN THINK ABOUT IT FOR A
SECOND FROM A COMMON SENSE
PERSPECTIVE.
JUSTICE EMBARGO WAS A DEFENSE
ATTORNEY AT ONE POINT.
IMAGINE GETTING IN FRONT OF
THESE JURORS AND SAYING OKAY,
THE DEFENDANT DID NOT DO THIS,
THESE STEPDAUGHTERS MADE THIS UP
BUT EVEN IF YOU BELIEVE THESE
ACTS OCCURRED, THEY DIDN'T
DEMONSTRATE THAT HE HAD LEWD OR
LASCIVIOUS INCENSE, YOU CAN'T
CREDIBLY MAKE THAT ARGUMENT
UNDER THESE CIRCUMSTANCES.
IT IS JUST NOT CREDIBLE.
>> ISN'T THAT THE POINT, THAT IF
THAT IS YOUR THEORY OF THE CASE,
THAT IS WHAT YOU'RE GOING WITH,
ALL OF A SUDDEN YOU HAVE
DIFFERENT CHARGES MAYBE YOU
WOULD HAVE DONE SOMETHING
DIFFERENTLY AS A THEORY OF THE
CASE.
>> THE ONLY THING, HE DIDN'T
EVEN SAY WOULD, HE JUST SAY
POTENTIALLY BUT THE RECORD SHOWS
HE DID HAVE BECAUSE EACH VICTIM,
HE DIDN'T GO THROUGH EACH COUNT
AND SAY WHAT ABOUT HERE AND WHAT
ABOUT HERE.
>> WE REALLY DON'T KNOW BECAUSE
IT WAS CHANGED, DON'T REALLY
KNOW EXACTLY.
>> SINCE IT WAS DONE AT THE JOA
STAGE WE DO KNOW BECAUSE HE GAVE

HIS OPENING STATEMENT AND IS
TOTALLY ARGUING THAT THESE GIRLS
FABRICATED WHAT WAS HAPPENING,
WE SEE HOW CROSS-EXAMINED THE
VICTIMS AND NEVER ASKED THEM ANY
QUESTIONS ABOUT THE NATURE OF
THE TOUCHING.
INC. ABOUT IT.
THESE VICTIMS, WHAT HAPPENS WITH
THE SORTS OF CASES IS A LOT OF
TIMES THE CHILDREN HAVE BEEN
ABUSED FOR A LONG TIME AND THERE
IS A DELAY OF REPORTING AND THAT
HAPPENED IN THIS CASE.
THE TWO YEARS LATER WE HAVE A
TRIAL, THESE LITTLE GIRLS ARE
BEING ASKED TO REMEMBER THINGS
THAT HAPPENED YEARS AGO AND THEY
MAY NOT REMEMBER ANY PARTICULAR
LOCATION WHETHER HE PENETRATED
WERE JUST TOUCHED THERE BUT.
SO WHY WOULD WE WANT TO LET
UNDER THE CIRCUMSTANCES BECAUSE
THE ERROR AND PREJUDICE ANALYSIS
ARE INTERTWINED IF THERE IS
PREJUDICE IT IS REVERSIBLE
ERROR, WE ARE TALKING ABOUT
LETTING SOMEBODY GO BECAUSE THE
LITTLE CHILD COULDN'T REMEMBER
MANY YEARS LATER WHETHER OR NOT
HE ACTUALLY PENETRATED OR NOT
WHEN HIS DEFENSE WAS HE WASN'T
PREJUDICED AT ALL BY THIS.
>> IN TERMS OF A LEGAL RULING IT
WOULD BE THE BURDEN WOULD BE ON
THE DEFENSE INSTEAD OF A
SPECULATING, COULD THIS OR THAT,
THEY AT LEAST HAVE ARTICULATE
PREJUDICE AND THE COURT CAN
EVALUATE.
>> I HAVE THAT IN MY STATEMENT,
THAT YOU WOULD LOOK AT THAT.
HE WASN'T EVEN GOING TO ARGUE
THAT BECAUSE IT IS NOT CREDIBLE
AND THAT IS PROBABLY WHY HE
ARGUED THAT SO MEEKLY BECAUSE
WITH THESE TYPES OF ALLEGATIONS,
YOU CAN'T CREDIBLY ARGUE THAT IF
THEY WERE DONE -- WHAT OTHER
QUESTIONS ARE YOU GOING TO ASK.
THE STATE ASKED QUITE A BIT OF
QUESTIONS ABOUT THE NATURE OF
THE TOUCHING, WHAT OTHER
QUESTIONS WOULD HE ASK ABOUT THE

TOUCHING UNDER THESE
CIRCUMSTANCES, TO SUGGEST THEY
WEREN'T LEWDLY LASCIVIOUS, HE
WASN'T PREJUDICED AT ALL.
HE WAS JUST MAKING A TOKEN
OBJECTION BECAUSE NO DEFENSE
TEAM WANTS TO BE THE BAD PERSON
WHO DIDN'T PRESERVE THE ISSUE ON
APPEAL BUT THE RECORD CLEARLY
SHOWS HE WASN'T PREJUDICED AND I
WOULD ALSO, IF THERE AREN'T ANY
MORE QUESTIONS --
>> ISN'T THIS THE SAME PREJUDICE
ANALYSIS THAT TRIAL JUDGES DO
DAY IN AND DAY OUT UNDER
RICHARDSON?
>> IS VERY AKIN TO RICHARDSON
BECAUSE WHAT HAPPENS, THE STATE
HOPEFULLY INADVERTENTLY GIVES
THE DEFENSE SOME NEW EVIDENCE IN
THE MIDDLE TRIAL AND THEN HE HAS
TO SAY HOW HE IS PROCEDURALLY
PREJUDICED.
IN THIS CASE AFTER BEING TOLD HE
CAN HAVE TWO HOURS TO THINK THIS
OVER THAT IS ALL HE COULD SAY,
POTENTIALLY HE COULD HAVE ASKED
THESE QUESTIONS.
ONE MORE THING I COULD MENTION,
WHEN KIDS COME OUT AND THEY
FORGET CERTAIN THINGS ABOUT THE
TESTIMONY, THE LAST THING YOU
ONE TO DO AS A DEFENSE ATTORNEY
IS ASK MORE QUESTIONS ABOUT THE
TOUCHING.
YOU RUN THE RISK OF HAVING THEM
REMEMBER OR CHANGE THEIR MIND
ABOUT WHAT THEY SAID.
THAT'S NOT A GOOD IDEA AND
THAT'S NOT WHAT HE WAS GOING TO
DO.
WE CAN LOOK AT HIS RECORD
ADVOCATE THE WAY HE PRESENTED
HIS ARGUMENT, THAT'S NOT THE
CASE.
IT IS NOT JUST THAT HE WASN'T
GREATLY PREJUDICED, HE WASN'T
PREJUDICED AT ALL IN THIS CASE
AND GOING TO THE SECOND PART
WHERE SHE SAYS A PER SE RULE
SHOULD BE APPLIED, I DON'T THINK
IT SHOULD BE APPLIED.
I THINK PER SE RULE SHOULD BE
LIMITED TO STRUCTURAL ERROR.

WE HAVE 9-24-33 WHERE OUR LEGISLATURE DOESN'T WANT US AUTOMATICALLY REVERSING THINGS. THEY WANT DEFENDANT SUBSTANTIAL RIGHTS TO THE PREJUDICE, THE LANGUAGE FROM THIS COURT'S PRECEDENT FOR AMENDING INFORMATION MIRRORS THAT AND I THINK THE LANGUAGE IS VERY SOUND.
WHEN YOU ARE THINKING ABOUT IMPOSING A PER SE RULE, YOU SHOULD ONLY DO IT IN CIRCUMSTANCES WHERE IT WOULD ALWAYS BE HARMFUL AND YOU HAVE NOTHING TO LOSE BY NOT IMPOSING A PER SE RULE.
IF SOMETHING IS ALWAYS HARMFUL AND IT GOES THROUGH A PREJUDICE ANALYSIS IT WILL GET REVERSED SO NOTHING BAD WILL HAPPEN WHEREAS IF YOU MAKE THIS PER SE PREJUDICIAL THERE WILL BE AN UNSPECIFIED NUMBER OF CASES WHERE THE DEFENDANTS ARE NOT PREJUDICED AT ALL AND THAT WOULD BE AN INJUSTICE AND WE HAVE JURY TRIALS WERE JUDGES AND PARTIES GET READY FOR TRIAL, PEOPLE HAVE TO GET OFF OF WORK TO GO IN, IT COSTS TAXPAYERS LOTS OF MONEY, THE VICTIMS ESPECIALLY IN CASES LIKE THIS HAVE TO GO THROUGH THIS ORDEAL, SO WHY ARE WE REVERSING AFTER THE JURY FOUND HIM GUILTY, HE'S NOT PREJUDICED AT ALL?
LIKE I SAID UNDER NORMAL CIRCUMSTANCES YOU DETERMINE IF THERE IS ERROR AND IF THERE IS PREJUDICE THERE WOULD BE A NEW TRIAL.
IN THIS CASE THERE IS NO NEW TRIAL.
THE DEFENDANT -- BECAUSE OF ACCOUNTS, THERE'S A LESS INCLUDED BATTERY BUT IN SOME CASES IT COULD RESULT IN A DEFENDANT ACTUALLY WALKING AWAY.
PETITIONERS ACTUALLY ASKING THIS COURT TO ENGAGE IN POLICYMAKING THAT IS INCONSISTENT WITH THE LEGISLATURE.
I MENTIONED I WAS HOPING THE

COURT WOULD LIMIT PER SE TO
STRUCTURAL ERROR AND I THINK
THAT WOULD MAKE IT EASIER FOR
YOU BECAUSE THE UNITED STATES
SUPREME COURT HAS CLEAR
PRECEDENT ON THAT, YOU DON'T
HAVE TO FOLLOW THEM BUT IF YOU
DID YOU WOULDN'T HAVE TO WORRY
ABOUT RUNNING AFOUL TO THEIR
CASE LAW.
>> IS THERE A POINT IN TIME THAT
YOU'VE GONE TOO FAR TO CHANGE
THE CHARGES?
IS THERE A POINT IN TIME WHERE
OKAY, THIS HAS GONE TOO FAR.
WE'VE SUBMITTED THIS TO THE JURY
AND THE CHARGES SHOULD NOT BE
CHANGED, AT WHAT POINT, IS THERE
ANY POINT IN TIME IT'S TOO LATE?
>> AFTER IT'S COME TO THE JURY
IN MY OPINION THAT WOULD BE TOO
LATE BECAUSE YOU'VE ALREADY MADE
YOUR ARGUMENT, HOW COULD A
DEFENDANT NOT BE PREJUDICED.
>> ABOUT THE JURY INSTRUCTIONS?
>> SOMETIMES THE JUDGES GET THE
JURY INSTRUCTIONS BEFORE CLOSING
ARGUMENTS, SOMETIMES AFTER.
I THINK IT WOULD HAVE TO BE
WHILE THE EVIDENTIARY PERSON WAS
GOING ON.
>> SO YOUR POINT HERE IS AFTER
CLOSING ARGUMENTS NO MORE
AMENDING THE INFORMATION.
>> NO MORE AMENDING INFORMATION.
>> I WAS A PROSECUTOR LONGER
THAN I WAS A DEFENSE LAWYER.
LET ME SNEAK THAT ONE IN.
THAT IS YOUR POINT.
ONCE THE LAWYERS GET OUT THERE
AND ARGUE CLOSING ARGUMENTS THAT
IS IT.
>> HOW COULD A DEFENSE ATTORNEY
NOT BE PREJUDICED, IF HE'S
MAKING HIS ARGUMENT TO A JURY
AND ALL OF THE SUDDEN THE
CHARGES ARE CHANGED I DON'T SEE
HOW YOU COULD POSSIBLY NOT BE
PREJUDICED.
>> HOW ABOUT OPENING STATEMENTS
WHEN LAWYERS GET UP AND TELL THE
JURY THIS IS WHAT I BELIEVE THE
EVIDENCE IS GOING TO SHOW.
YOU WOULD TAKE A LOT OF CASES,

THEY TELL YOU A LOT OF JURIES MAKE UP THEIR MIND AFTER OPENING STATEMENTS.
THE THING IS YOU ARE BASICALLY MAKING A PROMISE IN A SENSE WITHOUT SAYING THE WORD, TO THE JURY THE EVIDENCE IS GOING TO SHOW THIS, THIS, THIS AND THAT.
THE DEFENSE LAWYER GETS UP AND THE EVIDENCE WILL NOT SHOW THIS, THIS, THIS OR THAT, IT WILL SHOW THIS.
ARE LAWYERS AT THAT POINT IN TIME COMMITTED TO WHAT THE CHARGES ARE?
>> KNOW, YOUR HONOR.
FIRST OF ALL, JURIES RECEIVE INSTRUCTIONS THAT INFORMATION ARE NOT EVIDENT AND ARE NOT SUPPOSED TO BE CONSIDERED AS SUCH IN THE SAME WITH OPENING STATEMENT.
>> SAME COULD BE SAID OF CLOSING ARGUMENTS.
>> AND REGULAR TRIALS YOU HAVE MULTIPLE COUNTS AND CERTAIN COUNTS ARE REDUCED TO BATTERY AND GO TO A JURY AND WE WERE STILL ALLOWED TO DO THAT SO WHY WOULD THAT BE ANY DIFFERENT.
>> WHY WOULD A CLOSE AND I COMMEND BE DIFFERENT?
YOU SAID YOU CAN'T CHANGE THE DOCUMENT AFTER CLOSING ARGUMENTS.
WHY WOULD IT BE DIFFERENT?
>> IN THIS CASE HE GAVE THEM THE INSTRUCTIONS BEFORE --
>> WE ARE GOING TO MAKE A LINK ONE WAY OR THE OTHER.
IN GENERAL AFTER CLOSING ARGUMENTS HOW IS THAT DIFFERENT THAN AN OPENING STATEMENT?
>> BECAUSE THE EVIDENTIARY PORTION HASN'T STARTED YET.
THE DEFENSE CAN STILL QUESTION HIS WITNESSES AND DECIDE WHAT HE IS GOING TO ARGUE AND WHATNOT.
AT THAT POINT TRY WAS OVER, THE EVIDENTIARY PERSON IS OVER.
>> YOUR BEING LET DOWN THIS PATH.
THE BOTTOM LINE IS WHAT WE HAVE TO DECIDE IS OUR YOU GOING TO DO

A PREJUDICE ANALYSIS?
THE POINT ISN'T TO SPECULATE
ABOUT OTHER THINGS YOU MIGHT
WANT TO NARROW OR PER SE BUT
THESE THINGS, WOULD NOT BE HARD
TO SHOW PREJUDICE.
YOU DON'T NEED TO LOCK YOURSELF
INTO THESE OTHER TYPES OF
THINGS.
IT IS EITHER PRESIDENT --
PREJUDICE ANALYSIS AS A RESULT.
>> YOUR CASE LAW ALREADY SAYS
THAT.
IN THE CLEMENS CASE THE STATE
ACTUALLY ADDED ANOTHER CHARGE,
NOT JUST THE CHANGE OF ESSENTIAL
ARGUMENT BUT A BUNCH OF
ESSENTIAL ELEMENTS IN THIS COURT
INDICATED THAT THE TRIAL COURT
PROPERLY CONDUCTED A PREJUDICE
ANALYSIS AND DID NOT ALLOW THE
STATUS A BIT INFORMATION.
THIS COURT DID NOT SAY IT WAS
PER SE ERROR BUT BY ADOPTING
STRUCTURAL ERROR LIMITING PER SE
TO STRUCTURAL ERROR YOU ARE
GETTING THE JUDICIARY OUT OF THE
POLICYMAKING BUSINESS.
>> WERE THE AMENDMENTS BEFORE OR
AFTER INSTRUCTIONS?
>> THEY WERE BEFORE.
I DON'T THINK, LIKE I SAID, NOT
AS THOUGH I AM ARGUING THAT THE
STATE SHOULD JUST HAVE
UNFETTERED DISCRETION TO AMEND
INFORMATION.
THERE ARE MANY CIRCUMSTANCES
WHERE THE DEFENSE WOULD BE
PREJUDICED.
THE DEFENSE ATTORNEY CAN ARGUE
HE IS PREJUDICED IN HIS
INVESTIGATION OR IN THE NATURE
OF HIS DEFENSE IS ACTUALLY NOT
THAT HARD TO ARGUE YOUR
PREJUDICE.
IT WAS JUST PARTICULARLY HARD
UNDER THESE UNIQUE
CIRCUMSTANCES.
I DON'T THINK THIS HAPPENS A
LOT.
>> YOU ARE WELL OVER YOUR TIME.
IF YOU COULD SUM UP IN 30
SECONDS.
>> IF THERE AREN'T ANY MORE

QUESTIONS WE ASK YOU APPROVE THE
DECISION OF THE FIRST DISTRICT
AND YOU NOT IMPOSE THE PER SE
RULE IN THIS CASE.
THANK YOU.
>> REBUTTAL.
>> THE EVENT OF THE TRIAL AND
THE DEFENSE NOT GOING LIKE THAT
ACKNOWLEDGMENT THAT SHOULD BE
BASED ON THE IDEA OF THE CHARGE
THAT WOULD BE MUSIC AND YOU DID
ARRIVE WITH IT AND NOT GO THAT
WAY AND ON TOP OF THAT.
THE TO GET IS SEPARATE.
AROUND IT.
YOU CALL IT BECAUSE THE
ARGUMENT.
ON THAT STAGE.
IT DID NOT PROVE PENETRATION.
YOU HAVE THAT FOR TWO HOURS.
AND COME BACK FOR INFORMATION.
GO AHEAD AND USE ANALOGIES AND
SUGGESTIONS YOU COME UP WITH A
STATEMENT.
GOT CONVICTED IT TO THE GO TO
TRIAL.
DO YOU COME TO THE OPERATION AS
MUCH AS THEY WANT IN THIS TRIAL
AND THE WITNESSES THEY HAVE IT,
THEY HAVE IT WITH THE
EMERGENCIES IN THE TRIAL
THEREFORE ARGUE TO ALLOW THEM
TO AMEND TO GIVE THEM THE
EVIDENCE.
THAT CAME OUT AT TRIAL.
I URGE YOU TO REVERSE AND FIND
MY CLIENT WAS NOT GAUGED.
THANK YOU.
>> THANK YOU BOTH FOR YOUR
ARGUMENT IN THIS CASE TODAY.